Supreme Court, U.S.
FILED
991440 FEB 28 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1999

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-v-

KEITH BOSWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

ROBERT T. JOHNSON
District Attorney
Bronx County
198 East 161st Street
Bronx, NY 10451
(718) 590-2156
Counsel of Record

ANTHONY J. GIRESE
JOSEPH N. FERDENZI
STANLEY R. KAPLAN
Assistant District Attorneys
Of Counsel

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181

(8138 – 2000)

Printed on Recycled Paper

72pp

Question Presented

Whether this Court should review the precedent set by the New York Court of Appeals, which held that the Fourth Amendment of the United States Constitution prohibits the use of checkpoints to stop a non-arbitrary number of taxi and livery cabs as a means of crime prevention.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

POINT

The New York Court of Appeals has created precedent that uses the Fourth Amendment to unduly hamper effective law enforcement techniques, and has said that these strictures are contained in this Court's interpretations of the Fourth Amendment 6

CONCLUSION 12

APPENDIX

Appendix A: Decision and Order of the New York Court of Appeals 1a

Appendix B: Decision and Order of the Appellate Division, First Department 21a

Appendix C: Decision and Order of the Hearing Court on Reargument 35a

Appendix D: Initial Decision and Order of the Hearing Court 45a

TABLE OF AUTHORITIES

Cases

Brown v. Texas, 443 U.S. 47 (1979) 5

Delaware v. Prouse, 440 U.S. 648 (1979) 7, 8, 9

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) 5, 7, 10

In re Muhammad F., 94 N.Y.2d 136 (1999) 5 n.2

People v. Bialostock, 80 N.Y.2d 738 (1993) 6 n.4

People v. Harris, 77 N.Y.2d 434 (1991) 6 n.4

People v. John BB., 56 N.Y.2d 482 (1982), cert, denied, 459 U.S. 1010 (1983) 6

People v. Keith Boswell, 255 A.D.2d 173 (1st Dept. 1998) 1, 4

People v. Keith Boswell, 94 N.Y.2d 136 (1999) 5, 6, 7, 10, 11

People v. Torres, 74 N.Y.2d 224 (1989) 6 n.4

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 5, 6, 8

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 5, 6, 7

United States v. Santiago, 950 F.Supp. 590 (S.D.N.Y. 1996) 8 n.5

Constitutional Provisions

United States Constitution, Fourth Amendment 2

Statutes

N.Y.C. Charter § 2303(b)(6) 11

New York Penal Law § 10.00 (2),(6) 4 n.1

New York Penal Law § 10.20 (1)(a) 2

New York Penal Law § 20.20 (1)(a) 2

New York Penal Law section 220.16(1) 2

28 U.S.C. § 1257(a) 2

Other Authority

Supreme Court Rule 10(c) 2

Supreme Court Rule 13(1) 1

IN THE

Supreme Court of the United States

October Term, 1999

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-v-

KEITH BOSWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK —

Petition for a Writ of Certiorari

Petitioner (hereinafter "the state") respectfully prays for a writ of certiorari to review the judgment of the New York State Court of Appeals, entered in the above-captioned case on November 30, 1999.

Opinions Below

The Court of Appeals opinion is published at 94 N.Y.2d 136 (1999). The opinion of the Appellate Division, First Judicial Department, is published at 255 A.D.2d 173 (1st Dept. 1998). The decisions and orders of the hearing court are unreported.

Jurisdiction

The date the judgment of the Court of Appeals was entered is November 30, 1999. This petition is timely filed since it is within ninety days of the date of entry. Supreme Court Rule 13 (1).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), which states that "[f]inal judgments or decrees rendered by the highest court of a State may be reviewed by the Supreme Court by writ of certiorari. . .where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . ." and Rule 10 (c) of this Court, which states that the Court has jurisdiction where "a state court. . .has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Constitutional Provision Involved

United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to seized."

Statement of the Case

Review of a judgment of the New York Court of Appeals is sought. The basis for state jurisdiction in the court of first instance is New York Criminal Procedure Law sections 10.20 (1)(a) and 20.20 (1)(a), and New York Penal Law section 220.16 (1).

The State Suppression Hearing

Testimony at the state court suppression hearing established that as a member of the Taxi Livery Task Force in New York City's borough of The Bronx, Police Officer Ray Winslow was sent to precincts with a high incidence of cab robberies, and

assigned to set up taxi checkpoints, stop cabs, and hand out safety literature to the drivers. On February 27, 1995, Officer Winslow's supervisor, Sergeant Galati, gave him a directive to set up a checkpoint at 139 Exterior Avenue, and to stop every third cab. At approximately 9:00 p.m., Officer Winslow waited with the sergeant in an unmarked vehicle until the third cab they saw passed by. They pursued the cab and pulled it over opposite 725 Exterior Avenue. Officer Winslow approached the cab on the right side and saw respondent Keith Boswell (hereinafter "defendant") sitting in the right rear seat. Defendant was looking at Sergeant Galati, who had approached on the driver's side of the cab. When Officer Winslow was about ten feet from the cab, he saw defendant dip down and then come back up very quickly. The officer, shining a flashlight at defendant, then saw Boswell kick a dark blue plastic bag under the right front passenger seat. Officer Winslow opened the door and asked defendant what was in the bag. Defendant disclaimed any awareness of its existence. At that point, the officer ordered him out of the cab. When defendant left the cab, Sergeant Galati went into the rear passenger compartment, grabbed the bag, and opened it, revealing drugs. Officer Winslow then handcuffed defendant. The bag contained numerous packets of crack, vials of crack, vials of cocaine, money, and walkie talkies.

In its written decision and order of October 25, 1996, the state trial court granted the defendant's motion to suppress the gun. The court found that the cab stop was improper because the People did not produce evidence of a written systematic plan that limited Officer Winslow's discretion in conducting the checkpoint cab stop. Consequently, the court suppressed the physical evidence as fruit of the unlawful stop. Upon motion for reargument, the court granted reargument but adhered to its original ruling. Although the court acknowledged that written guidelines were not required, the court found that the police action was not a checkpoint stop, but a random "roving patrol

stop" requiring reasonable suspicion of either a violation of the New York Vehicle and Traffic Law or of a crime[1] before a vehicle could be stopped. In a footnote, the court observed that had the stop been lawful, defendant would not have had standing to challenge the admission of the bag since his disclaimer of ownership constituted an abandonment.

The Appeal to the Appellate Division, First Judicial Department

On appeal to the Appellate Division, First Department, the People argued that although the police did not employ a classic checkpoint, the procedure used herein served a legitimate governmental interest and was conducted in a nonarbitrary and nondiscriminatory manner. The majority of the court reversed the nisi prius court, finding that there was a legitimate governmental interest in stopping taxicabs so that police could provide drivers with safety literature, that there was no requirement for written guidelines, that the procedure was supervised in accordance with a nonarbitrary and nondiscriminatory plan to stop every third cab, and that the police vehicle's following of the third cab, after that vehicle passed the fixed checkpoint, was a minimal intrusion. People v. Keith Boswell, 255 A.D.2d 173 (1st Dept. 1998), lv. granted, 92 N.Y.2d 1055 (1999) (Tom, J.). Justice Peter Tom dissented, finding that the procedure employed was "more akin to a mobile patrol than a stationary checkpoint" (255 A.D.2d at 180), there was no evidence of a "policy" that was "promulgated by the central command" (255 A.D.2d at 180), and that the governmental interest in disseminating safety literature could have been accomplished in a less intrusive manner (255 A.D.2d at 179).

---

[1] Under New York law,"crime" is defined in a manner that excludes traffic violations. New York Penal Law § 10.00 (2),(6).

The Court of Appeals Decision

Judge Howard A. Levine , writing for the majority, found that the stop of the livery cab was an unreasonable seizure in violation of the Fourth Amendment and reversed the decision and order of the Appellate Division, First Department.[2] The majority based its decision upon this Court's decisions on suspicionless stops of automobiles. The court, citing Brown v. Texas, 443 U.S. 47 (1979), and Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), noted that such a stop is a seizure, the reasonableness of which depends upon a balance between the public interest and the individual's right to be free from arbitrary interference by police. Boswell, 94 N.Y. 2d at 142. The court then contrasted roving patrol stops, as discussed in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), with fixed checkpoint stops, as discussed in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), to note that in fixed checkpoint stops there is less subjective intrusion on the traveler. Further, the court, also relying on this Court's decisions, noted the importance of limiting the discretion of the officers in the field, and apparently held that there must be empirical data demonstrating the effectiveness of the procedure. Finding that cab drivers would be "taken by surprise," that the state could have employed a roadblock, and that the effectiveness of the program had not been established, the majority of the Court of Appeals held that the evidence should be suppressed.

The Dissent

Judge George Bundy Smith dissented, noting the legitimate governmental interest in preventing robberies of cab drivers and

---

[2] There was a companion case, In re Muhammad F., 94 N.Y.2d 136 (1999), which was consolidated with the instant case in the Court of Appeals. The instant petition does not seek certiorari in that case.

concluding that the procedure employed was not unconstitutional because the policy was unwritten. He found that stopping every third cab that passed the officers' fixed location was nonarbitrary. Further, the judge noted that, in People v. John BB., 56 N.Y.2d 482 (1982), cert, denied, 459 U.S. 1010 (1983), the New York Court of Appeals had previously determined that neither United States v. Martinez-Fuerte nor United States v. Brignoni-Ponce, "constituted a barrier to the procedure undertaken." Boswell, 94 N.Y.2d at 152.[3]

Reasons for Granting the Writ

POINT

The New York Court of Appeals, misinterpreting this Court's precedent, has held that the Fourth Amendment must be interpreted in a hypertechnical manner that is unduly restrictive.

Although the New York Court of Appeals purported to rely upon the decisions of this Court in arriving at its determination, the state court significantly departed from the holdings of those cases, and thereby imposed unwarranted strictures on police conduct.[4] The procedure employed in this case served a

---

[3] The dissenting judge also found that defendant did not sustain his burden of showing that he had a reasonable expectation of privacy in the passenger compartment and, thus, did not demonstrate that he had standing to contest the search of the vehicle. The People are not asserting this issue as a basis for certiorari.

[4] It noteworthy that the New York Court of Appeals eschewed any reliance on state constitutional jurisprudence, a marked departure from its approach in other cases. See, e.g., People v. Bialostock, 80 N.Y.2d 738 (1993); People v. Harris, 77 N.Y.2d 434(1991); People v. Torres, 74 N.Y.2d 224 (1989). Thus, only the federal constitution is at issue.

legitimate governmental interest, was nonarbitrary and nondiscriminatory, and complied with this Court's interpretation of the United States Constitution.

As this Court acknowledged in United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); Delaware v. Prouse, 440 U.S. 648, 663 (1979); see also Michigan Police Department v. Sitz, 496 U.S. 444, 450 (1990), a roadblock or checkpoint constitutes a seizure implicating the Fourth Amendment. However, this Court has also held that a suspicionless stop of an automobile is constitutional when reasonable, which is determined by balancing the level of intrusion on the Fourth Amendment-protected interests of the individual against the promotion of legitimate governmental interests. Delaware v. Prouse, 440 U.S. at 657; Michigan Dept. of State Police v. Sitz, 496 U.S. at 450. The checkpoint procedure utilized in this case satisfied constitutional requirements. In terms of promoting legitimate governmental interests. the checkpoint operation allowed the police to provide cab drivers with safety literature and discourage cab robberies in an area plagued with such crime. The stop of the cab in which defendant was a passenger was carried out in a nonarbitrary, nondiscriminatory manner. The record is clear that Officer Winslow, a member of the Taxi Livery Task Force, was directed by a supervisor to stop every third cab that passed a fixed location in The Bronx, in an area plagued with cab robberies, and provide the driver with safety literature. In accordance with that procedure, when Officer Winslow and his sergeant saw the third cab drive past the checkpoint, they followed the car, and stopped it.

The fact that the police did not employ a traditional roadblock does not establish impropriety. Indeed, even the New York Court of Appeals was forced to acknowledge that "[t]he Supreme Court had not adopted a per se rule...requiring a fixed checkpoint or roadblock in all cases." Boswell, 94 N.Y.2d at 145.

The salient issue is whether or not the procedure is nonarbitrary. This Court has criticized roving patrols when the police engaged in random pursuit. See Delaware v. Prouse, 440 U.S. 648 (in the absence of any guidelines or standards, police officer stopped car to check driver's license and registration); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Border Patrol Agents stopped at random any vehicle near the border to check for illegal aliens or smuggling). However, the police here were not roaming the roads randomly targeting cars. Instead, the officer and his sergeant, who supervised the procedure, were at a fixed location, and moved away from that point only when the third cab passed by. The minimal pursuit entailed in such procedure did not transform a fixed checkpoint into a roving patrol that stopped cars at random.

The state court's application of Brignoni-Ponce, 422 U.S. 873, to this case is erroneous. There, the government conceded as a factual matter that a roving patrol was employed (id. at 876), and there was inherent randomness in the objective of stopping cars with passengers that appeared to be of Mexican origin. The police, here, were not on patrol, but stationary until the third cab went by. Moreover, the police in this case were not targeting cabs based upon some ethnic or racial profile; the cabs were selected on the basis of a neutral criterion, namely every third vehicle, occupied or unoccupied.[5] Since the cab in which defendant was riding was the third cab to pass the location after the police set up the checkpoint, the police stopped it.

---

[5] The stop of only occupied cabs was at issue in United States v. Santiago, 950 F. Supp. 590 (S.D.N.Y. 1996), in which the District Court found, "If the goal of the program were really to hand out safety pamphlets to drivers, stops of unoccupied cabs, or of all taxicabs, would be just as effective as stops of occupied cabs," and concluded, "The only rational reason for the NYPD to distinguish between occupied and unoccupied taxicabs is to size up the passenger. The Fourth Amendment does not permit governmental conduct absent at least reasonable suspicion." Id. at 596.

Defendant's contention in the court below that the method employed was "impractical" has no support in the record. Further, even if, arguendo, the police could not ensure that every third cab would be pursued, the criterion for the stops eliminated the arbitrary use of discretion by the officer in the field.

The basis for the ruling of the New York Court of Appeals is misplaced; instead of looking at whether the record in its entirety supported a finding of reasonableness, it seized upon the fact that there was no "empirical data" justifying the particular procedure. Imposing such requirement was error. While it is true that this Court has noted the lack of empirical data in Delaware v. Prouse, 440 U.S. 648, this was done only because the procedure employed, a random vehicle stop to check driver's licenses, was obviously ineffective. In that context, this Court observed that there was no empirical evidence rebutting that common-sense conclusion: "Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." Id. at 659 (emphasis supplied). There is no holding of this Court, however, that per se requires production of empirical data concerning effectiveness to sustain a roadblock or checkpoint procedure.

The state court decision is peculiar in its requirement of empirical data where common sense would dictate that a traditional roadblock, when utilized in the crowded vehicular traffic conditions of New York City, would produce unpleasant consequences such as increased delays for non-cab motorists, including buses and emergency vehicles, and air pollution for idling motor vehicles. Indeed, one would need data to justify the counterintuitive conclusion that a traditional roadblock would work better on the streets of a very crowded city.

Equally faulty was the court's reasoning that the police acted improperly since they could have provided cab drivers with safety literature by other means. The police determination that the best method for making cab drivers take note of safety information was to employ checkpoints was a legitimate choice among reasonable alternatives that should not have been countermanded simply because there were other means available. As this Court stated in Michigan Dept. of State Police v. Sitz, 496 U.S. at 453-454, "[e]xperts in police science might disagree over which of several methods of apprehension of drunk drivers is preferable as an ideal. But for purposes of the Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." It was proper for the police to ascertain and implement the best method for stopping cabs on the crowded streets of New York City, so long as it was a reasonable alternative to a traditional roadblock. Certainly, the efficacy of stopping every third cab that passed a checkpoint, pursuant to a nonarbitrary plan that did not inconvenience other motorists, should not have been lightly discounted by the New York Court of Appeals.

The state court further held that the procedure was invalid because, unlike a roadblock, it was not obvious to the motorist and, therefore, was subjectively intrusive. Boswell, 94 N.Y.2d at 147. This Court, however, has never held that warnings signs are the sine qua non of the legitimacy of a checkpoint procedure. In Sitz, 496 U.S. 444, this Court noted the "fear and surprise" that could be engendered by a stop of a typical motorist in the absence of a traditional roadblock. Id. at 452. But, here, the plan targeted only livery cabs. A cab driver is not an ordinary citizen behind a steering wheel, but a working professional driver, subject to regulation far more pervasive than that applicable to ordinary drivers. For example, in New York City,

the operation of the vehicle must conform with specific and comprehensive regulations. See, e.g., N.Y.C. Charter §2303(b)(6) (Taxi and Limousine Commission to regulate the "[r]equirements of standards of safety, and design, comfort, convenience, noise, and air pollution control and efficiency in the operation of vehicle and auxiliary equipment"). Hence, it would be unwarranted to conclude that a cab driver would experience anxiety in the same degree as an ordinary driver. Moreover, New York's high incidence of robberies, assaults, and murders of cab drivers must be presumed to be common knowledge among that group, as well as the commensurate involvement of the police in programs designed to prevent those crimes.

Further, the court erred in finding that the stop was unconstitutional because there was no showing that the discretion of the officers was properly circumscribed other than by their own testimony that they were following verbal instructions. Boswell, 94 N.Y.2d at 147-48. There is no holding from this Court that written instructions are a necessary prerequisite for an otherwise permissible stop.

The decision of the New York Court of Appeals constituted an unreasonable application of this Court's law on suspicionless stops, which will have a serious adverse effect upon the implementation of legitimate law enforcement policies. Because of the high regard in which the New York Court of Appeals is held, other state courts may follow the precedent set by it, thereby multiplying the erroneous interpretations of this Court's Fourth Amendment jurisprudence. Accordingly, this Court should grant the People a writ of certiorari.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT T. JOHNSON
District Attorney
Bronx County
198 East 161st Street
Bronx, New York 10451
(718) 590-2156
Counsel of Record

ANTHONY J. GIRESE
JOSEPH N. FERDENZI
STANLEY R. KAPLAN
Assistant District Attorneys
Of Counsel

February 25, 2000

Appendix A

Decision and Order of the New York Court of Appeals, entered November 30, 1999

Official Cite
94 NY2d 136 (1999)

1 No. 160
In the Matter of Muhammad F.,
A Person Alleged to be
a Juvenile Delinquent,
Respondent,
Presentment Agency,
Appellant.

- -

1 No. 161
The People & c.,
Respondent,
v.
Keith Boswell,
Appellant.

Case No. 160:
Stephen J. McGrath, for appellant presentment agency.
Raymond E. Rogers, for respondent

Case No. 161:
Richard M. Greenberg, for appellant.
Stanley R. Kaplan, for respondent.

LEVINE, J.:

These appeals arise out of motions to suppress evidence introduced against occupants of taxicabs that were stopped by police officers assigned to a Taxi-Livery Task Force in New York City. The procedure of the police was essentially the same in both cases. The officers were in plain clothes, using unmarked police cars, on a roving patrol. They selected a location in an area having a high incidence of taxi robberies. In the absence of probable cause, suspicious behavior or any illegal activity on the part of the driver or passengers, they pulled over a predetermined percentage of livery vehicles. The purpose of the stops was to provide a "safety check," to give the drivers crime prevention information and make an assessment of whether the

driver may have been in danger. For the reasons that follow, we conclude that the stops in both of these cases were unreasonable seizures violating the Fourth Amendment of the US Constitution.

I.

The material facts in these cases are not in dispute. In Muhammad F., two police officers wearing civilian clothes and driving in an unmarked police car, pulled over a cab in which respondent was a passenger and arrested him after he was found to be in possession of a controlled substance. Respondent was subsequently adjudicated a juvenile delinquent.

According to the suppression hearing testimony of the commanding officer of the Taxi-Livery Task Force, the unit was created in 1992 to address the high incidence of violent crimes against cab drivers. The taxi program targeted certain neighborhoods, especially between 6:00 p.m. and 2:00 a.m. Special attention was given to cabs with passengers. Members of the Task Force would stop a taxi, hand the driver a pamphlet with safety tips and question the cab driver as to his safety, while at the same time watching the reaction of the passengers in the cab. Generally, such a safety check would involve asking the passengers to "step out briefly" or "telling passengers to get out" while the officers searched around and under the seats.

There were no written guidelines as to how the taxi stops were to be carried out. Instead, the officers proceeded on verbal instructions under which the stops were to be done "in a set basis and not just arbitrarily." Whether the officers stopped every cab, or every second, third or fifth taxi was not based on a fixed format, but varied, depending on circumstances seen and acted upon solely by the officers in the field. The number of stops the officers were to make on their tour throughout the night was totally within their discretion. The officers did not keep any written record of stops they had made.

On the night of July 7, 1996, the patrolmen parked their unmarked car just off 145th Street in Manhattan to conduct taxi safety checks. The officers decided to check one in three occupied cabs. The third vehicle the officers saw which they believed to be an occupied taxicab was the non-medallion taxi in which respondent was riding. They turned onto 145th Street to drive up behind the vehicle, put a flashing light on the dashboard and pulled over the vehicle. One officer then approached on foot while shining a flashlight into the car. When he saw that respondent was acting suspiciously, he ordered the passengers out of the car and searched the back of the cab, where he found a paper lunch-style bag containing crack cocaine. Respondent was arrested.

Supreme Court denied Muhammad F.'s motion to suppress the evidence obtained as a result of this stop, and respondent was ultimately adjudicated a juvenile delinquent for committing acts which, if committed by an adult, would constitute criminal possession of a controlled substance. The Appellate Division reversed (255 AD2d 168), holding that the evidence against respondent was the product of an unconstitutional seizure. One Justice dissented. Petitioner presentment agency appealed pursuant to leave granted by the Appellate Division.

II.

In Boswell, defendant was arrested by a plainclothes Sergeant and patrolman belonging to the Taxi-Livery Task Force after their unmarked car stopped a taxicab in which defendant was a passenger. Boswell was also found to be in possession of illegal drugs.

At the suppression hearing, the patrolman testified that the Taxi-Livery Task Force established locations to stop cabs and hand out safety tips and other literature to the driver. The

officers usually stopped every third cab, but there were no written procedures. The Sergeant supervisor determined when to initiate and suspend the operation.

The officers, both in plain clothes, were working a night shift on February 27, 1995, when the Sergeant decided to set up operations on Exterior Avenue in the Bronx. They would stop every third livery vehicle, whether it was occupied or not — although there was no testimony as to how they could determine that a car with no passengers in the back seat was a non-medallion taxicab.

The two officers did not stop the first two passing cars they believed to be cabs. When a third passed by them, the officers followed it and pulled it over. After the taxi had stopped, the testifying officer shined his flashlight at defendant, noticed he was attempting to conceal a plastic bag and asked him to exit the cab. The bag contained packets of crack cocaine, and defendant was charged with criminal possession of a controlled substance in the third degree.

Supreme Court suppressed the evidence obtained as a result of the stop. The Appellate Division reversed (255 AD2d 173), but one Justice dissented and granted defendant permission to appeal to this Court.

III.

A brief, suspicionless stop of an automobile, while far less intrusive than a traditional arrest, nonetheless qualifies as a seizure (see, Michigan Dept. of State Police v Sitz, 496 US 444, 450; People v Spencer, 84 NY2d 749, 752). The reasonableness of such a seizure "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'" (Brown v Texas, 443 US 47, 50 [emphasis supplied; internal citations omitted]).

Determining whether these stops are constitutional requires a weighing of "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty" (id., at 50-51). A critical requirement for all such seizures relates to the "central concern * * * that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field" (id., at 51). Namely, "the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" (id.; see also, People v Spencer, supra, at 758-759).

In Michigan Dept. of State Police v Sitz, the Supreme Court that the balancing analysis of Brown v Texas and earlier precedents should be utilized in these "cases dealing with police stops of motorists on public highways" (Michigan Dept. of State Police v Sitz, supra, at 450). Employing these standards, in United States v Brignoni-Ponce (422 US 873), the Court had previously held that a suspicionless, random "roving-patrol" by Border Patrol officers to conduct a brief review of the citizenship or immigration status of the vehicle's occupants was unconstitutional. The roving-patrol stop was described as follows: "a fixed checkpoint * * * was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it" (id., at 874-875). Preventing "the illegal entry of aliens at the Mexican boarder" was a "valid public interest" (id., at 878-879). The Court held that the stops were unconstitutional, nevertheless, after taking into account "the availability of alternatives to random stops unsupported by reasonable suspicion" (id., at 883 n 8). Significantly, the Court emphasized that the stops would have subjected residents" to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers" (id., at 882).

By contrast, United States v Martinez-Fuerte (428 US 543) upheld suspicionless stops by the Board Patrol of northbound vehicles at a fixed checkpoint some 60 miles from the Mexican border, on a major artery from the border (id., at 545). At the checkpoint, still without reasonable suspicion, a uniformed agent directed some of the automobiles to a secondary inspection area for further inquiry regarding the citizenship and immigration status of the occupants (id., at 546-547). After noting the substantial public interest furthered by the practice of routine stops at permanent checkpoints near the border (id., at 556), the Court concluded that a reasonable suspicion requirement "would be impractical because the flow of traffic tends to be too heavy to allow * * * particularized study," and "such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations" (id., at 557 [emphasis supplied]).

As with the roving-patrol stop, the "objective intrusion — the stop itself, the questioning, and the visual inspection" — was "quite limited" (id., at 557-558 [emphasis supplied]). But "the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop" (id., at 558 [emphasis supplied]). At routine checkpoint stops, motorists can see that other vehicles are being stopped and "are not taken by surprise" (id., at 558-559). The checkpoint, however, was not required to scrutinize every car in the same manner (id., at 563). In fact, the "selective referrals — rather than questioning the occupants of every car — tend[ed] to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public" (id., at 560).

In addition, the Court in Martinez-Fuerte reemphasized the decisiveness of limiting the discretion of officers in the field.

> "[C]heckpoint operations both appear to and actually involve less discretionary enforcement

> activity. * * * The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the effective allocation of limited enforcement resources. * * * And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review" (id., at 559).

Subsequently, Delaware v Prouse (440 US 648) held that a police officer may not arbitrarily pull over an automobile merely to check a driver license and registration. "In those situations in which the balancing of interests precludes insistence upon 'some quantum of individualized suspicion' * * * other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'" (id., at 654-655). Thus, in assessing the validity of the suspicionless patrol stop an at automobile chosen at random, the Court weighed (1) the State's vital interest in ensuring * * * that licensing, registration, and vehicle inspection requirements are being observed" (id., at 658); (2) "whether in the service of these important ends the discretionary spot check [was] a sufficiently productive mechanism to justify the intrusion" (id., at 659); and (3) "the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents" (id., at 657).

The Court emphasized that "[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed" (id., at 661). Thus, Delaware v

Prouse held that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers" (id., at 663; see also, People v Spencer, supra, 84 NY2d, at 758-759).

By contrast, suspicionless stops of vehicles to conduct sobriety checks at checkpoints under written guidelines are constitutional, even if the location of the roadblock regularly changes (Michigan Dept. of State Police v Sitz, supra, 496 US 444; People v Scott, 63 NY2d 518). After reaffirming the applicability of Brown v Texas, the Court in Sitz recognized the magnitude of the governmental interest in combating drunken driving (Michigan Dept. of State Police v Sitz, supra, at 450-451; see also, People v John BB., 56 NY2d 482, 488).

Sitz also addressed "'the degree to which the seizure advance[d] the public interest'" (Michigan Dept. of State Police v Sitz, supra, at 453). The Court strongly emphasized that in weighing this Brown v Texas factor, a court is not to assess the propriety and the need of the particular means used by law enforcement authorities to advance the public interest. The "effectiveness" part of the test "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger" (id.). Rather, it is sufficient for a court to determine that there is some "empirical data" demonstrating the effectiveness of the means chosen by law enforcement officials (id., at 453-455).

As for the severity of the interference, the Court found that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint [was] for constitutional purposes indistinguishable from the checkpoint stops * * * upheld in Martinez-Fuerte" (Michigan Dept. of State Police v Sitz, supra, at 453). Finally, there was no question in Sitz that the discretion of officers in the field was adequately circumscribed, because the checkpoint was

operated according to "guidelines setting forth procedures governing checkpoint operations, site selection, and publicity" (id., at 447).

Respondent in Muhammad F. and defendant in Boswell urge that the absence of a fixed checkpoint or roadblock is alone sufficient to invalidate the seizures in these cases. We do not accept that proposition. The Supreme Court has not adopted a per se rule banning all such stops and requiring a fixed checkpoint or roadblock in all cases. Suspicionless patrol stops are suspect as a general matter because of both their elevated potential intrusiveness and their greater opportunities for the unlimited exercise of discretion by police; no such stop has been upheld by the Supreme Court or our Court when it was conducted at random. Suspicionless stops, however, of "all oncoming traffic at roadblock-type stops" to check driver license and registration are permissible (Delaware v Prouse, supra, at 663; see also, id., at 664 [Blackmun, J., concurring; "I necessarily assume that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point)"]; Texas v Brown, 460 US 730, 739).

Consistent with the foregoing approach, People v John BB, (supra, 56 NY2d 482) upheld the constitutionality of patrol stops conducted in a "uniform and nondiscriminatory manner" of all vehicles traveling in a sparsely populated rural area soon after a recent series of burglaries was discovered (id., at 488-489). The "legitimate function of acquiring information regarding the recent burglaries" outweighed the interference with drivers' rights, given that the area "was too large to permit any meaningful utilization of traditional investigative procedures" (id., at 488). Thus, neither New York nor United States Supreme Court precedents require automatic foreclosure of such stops, without examining whether a systematized non-arbitrary method was employed to accomplish them and conducting a particularized inquiry into the reasonableness of the stops, using the Brown v Texas balancing analysis.

IV.

In applying the arbitrariness and Brown v Texas standards to the circumstances presented on the record before us, we conclude that the stops of the taxicabs in these cases were unreasonable and invalid. Regarding the first factor to be weighed, we do not doubt the magnitude of the governmental interest in protecting victim-prone taxicab drivers late at night on urban streets from a crime wave of violent robberies and homicides by disseminating information to the drivers and preventing crimes that are in progress or imminent.

Turning to the effectiveness prong of the Brown v Texas test, it was, of course, for New York City law enforcement officials to decide "which among reasonable alternative law enforcement techniques should be employed to deal with [the] serious public danger" of violent taxicab crime (Michigan Dept. of State Police v Sitz, supra, at 453 [emphasis supplied]). The Prosecution in these cases, however, failed to submit any empirical evidence that this type of patrol stop — as opposed to fixed checkpoint stops by uniformed officers in marked cars — was a reasonably effective means of furthering the State interest in reducing violent crimes against taxi drivers (cf., id., at 454-455; People v Scott, supra, at 523, 526-527). There was no showing of the unavailability of less intrusive or discretionary means to prevent violent crime directed at the drivers of livery vehicles (see, Delaware v Prouse, supra, at 659). Absent from the record is any evidence that the operation of a stationary checkpoint by uniformed officers in marked police cars was "impractical" (United States v Martinez-Fuerte, supra, at 557) or that circumstances did not "permit any meaningful utilization of [such] traditional investigative procedures" (People v John BB., supra, at 488).

Moreover, these stops were excessively and, on these records, unjustifiably intrusive, both objectively and subjectively.

As for the objective intrusiveness, the safety checks in Muhammad F. were described as routinely involving a request or direction that the passengers step out of the cab while the officers searched it (cf., United States v Brignoni-Ponce, supra, at 880). Subjectively, in each case, the police employed a roving-patrol stop in which a single, unmarked police car operated by non-uniformed officers pulled over the taxi. Since it was nighttime and there were no signs, cones or flares to warn the drivers that they would be stopped, the motorists were "taken by surprise" (United States v Martinez-Fuerte, supra, at 559). The plainclothes officers then proceeded to walk towards the taxicabs, shining their flashlights at the occupants. Because the cab drivers could not "see * * * other vehicles * * * being stopped" and there were no "visible signs of the officers' authority," this is precisely the type of police stop that would "generat[e] concern or even fright on the part of lawful travelers" (Michigan Dept. of State Police v Sitz, supra, at 452-453). Indeed, given that police chose the locations of the stops because they were high taxi-crime areas, the occupants' first reaction might well have been fear that they were being car jacked or mugged. The subjective intrusion would have been significantly less had there been some means employed to provide assurance that this was a police operation employing "a uniform system for stopping cars" (People v Scott, supra, 63 NY2d, at 527).

Of equal significance, the records in these cases contain no showing that the Task Force had attempted to mitigate the constitutional infirmity of "standardless and unconstrained discretion" of "the official in the field" (Delaware v Prouse, supra, at 661) other than the vague and purely conclusory testimony that the officers had verbal instructions to stop taxis "in a set basis and not just arbitrarily." For example, had the Police Department produced evidence of particularized guidelines with "listed criteria" that "established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle;

[and] location of the screening areas" (People v Scott, supra, at 522-523), then we would have some assurance that the stops were "being maintained in accordance with uniform procedure which afforded little discretion to operating personnel" (id., at 526; see, Delaware v Prouse, supra, at 650; cf., Michigan Dept. of State Police v Sitz, supra at 447, 453; see generally, LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich L Rev 442 [1990]). Since the officers here were not even required to make a written record of stops that had taken place, in conducting our "post-stop judicial review" (United States v Martinez-Fuerte, supra at 559), we are relegated to the self-verifying evidence from the officers whose conduct is being challenged to determine whether they were using uniform and nondiscriminatory procedures.

On the scanty proof adduced in these cases, there was a failure either to establish the reasonableness of the patrol stops here under the three-pronged balancing test of Brown v Texas (supra) or to satisfy the constitutional requirement that the stops were "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" (id., at 51; cf., People v John BB., supra, at 485 ["stops were conducted in a uniform, nonarbitrary and nondiscriminatory manner"]). Thus, the evidence was properly suppressed in Muhammad F. and improperly admitted in Boswell.

With respect to the dissent, the focus of these appeals in our Court was the legality of the stops. The issue of standing was barely mentioned by the Prosecutions; in the lengthy Appellate Division decisions it was not alluded to at all. We therefore choose to assume standing for present purposes, consistently with our precedents, and reach the merits of the issues the parties addressed. As for the dissent's analysis on the merits, we have already noted that the stops in these cases were carried out arbitrarily at the discretion of the officers in the field, whereas in

People v John BB, (supra), the stop "was made pursuant to a nonarbitrary, nondiscriminatory and uniform procedure, involving the stop of all vehicles" (id., at 488).

Accordingly, in Muhammad F., the order of the Appellate Division should be affirmed, without costs, and the certified question not answered as unnecessary; in Boswell, the order of the Appellate Division should be reversed and the order of Supreme Court, Bronx County, reinstated.

No. 160 Matter of Muhammad F.

No. 161 People v. Boswell

SMITH, J. (dissenting):

Because I believe that the procedures used here were appropriate in the effort to prevent crime against taxicab drivers and because I believe that the constitutional rights of the defendants were not violated by the searches, I dissent.

Matter of Muhammad F.

On July 7, 1996, at about 11 PM, the police were in plain clothes patrolling an area in which there had been many robberies of taxicab drivers. The procedure was to stop every third cab, make inquiry as to safety of the driver and give the driver a safety pamphlet. When the taxicab was stopped, the police noticed one of the three passengers lean forward and push something under the front seat of the vehicle. The three persons were ordered out of the vehicle and the vehicle was searched. The search revealed a bag pushed under the front seat containing drugs and drug paraphernalia. Two of the passengers denied that the drugs belonged to them. Respondent juvenile admitted that

the drugs were his. He was arrested and charged with acts constituting criminal possession of a controlled substance and related crimes.

Muhammad F. moved in Family Court to suppress the drugs recovered from the taxicab. The allegations made in support and in opposition to the motion are crucial to a decision in this case. Muhammad F. alleged that the evidence was seized from him in violation of the Fourth, Fifth and Sixth Amendments to the Federal Constitution and to article I, §§ 6 and 12 of the New York State Constitution. The People denied that the rights of the juvenile were violated and further alleged that he had no standing to challenge the seizure of the evidence.

Family Court denied the suppression motion. The Appellate Division reversed, with one Justice dissenting, granted the suppression motion and dismissed the juvenile delinquency petition.

On this appeal, the prosecution/appellant in Muhammad F. argues that the Taxi Robbery Task Force Program is a reasonable means of attempting to prevent the robbery and assault of taxicab drivers. Respondent Muhammad F. argues that he was illegally stopped by police officers in plainclothes without any suspicion of wrongdoing and pursuant to an arbitrary, unwritten policy.

People v Boswell

On February 26, 1999, at about 9 PM, the police were in an unmarked car stationed at a fixed location in the Bronx. The officers were part of a program to stop every third taxicab in an effort to thwart a series of taxicab robberies. When the taxicab passed the location at which the police car was stationed, the police pursued and stopped it. An officer observed defendant

kick a bag under the front seat of the vehicle. When the officer asked if the bag belonged to defendant, he denied ownership. The bag was examined and drugs were recovered.

Defendant Boswell moved to suppress the evidence seized on the ground that it was recovered in violation of the Fourth Amendment to the Federal Constitution and article I, § 12 of the New York State Constitution. The People denied any violation of these provisions and, in addition, alleged that defendant had no standing to challenge the search of the taxicab.

Supreme Court granted defendant's motion to suppress. In its opinion, the court ruled that defendant had standing to challenge the stop of the vehicle. On reargument, the court adhered to its decision. It also ruled that had the stop of the car been lawful, defendant would lack standing to challenge the search of the bag.

The Appellate Division reversed. In its brief to the Appellate Division, the People argued that defendant lacked standing to contest the search of the vehicle. The standing issue was not, however, addressed by the Appellate Division.

On appeal here, defendant/appellant Boswell argues that the police were engaged in a roving patrol, that the stop of the taxicab was without suspicion and unconstitutional, and that the seizure of the drugs was fruit of that wrongful stop. The People argue that the stop was pursuant to a uniform, nonarbitrary and nondiscriminatory policy of stopping every third taxicab which passed a fixed location and that defendant has no standing to contest the search of the taxicab since he disclaimed ownership of the seized bag.

Discussion

At the heart of these appeals is the policy designed to prevent robberies of and assaults upon taxicab drivers in New York City. At the hearing in Muhammad F., Captain Savage, the commander of the Street Crimes Unit, testified that because of 3,600 robberies of taxicab drivers in 1992, the unit, in 1993, was assigned to concentrate on the prevention of such robberies. He testified further, "The crime rate has declined in every precinct that we targeted." There is no dispute that the government has a legitimate interest in preventing such occurrences. A policy undertaken in response to criminal activities against taxicab drivers can be reasonable and consistent with the requirements of the Fourth Amendment and article I, section 12 of the New York State Constitution.

Two features of the current policy should be noted. First, the policy is unwritten. While the fact does not make the policy unconstitutional, a written policy would be more susceptible to review. Second, the policy consists of fixed locations where the police have a uniform, nonarbitrary policy of stopping vehicles, (see, People v Ingle, 36 NY2d 413), although a roving patrol, narrowly focused on a particular crime situation, has also been upheld (People v John BB, 56 NY2d 482, cert denied, 459 US 1010 [all vehicles in a particular area were stopped by a roving patrol after a series of unsolved burglaries]).

To be constitutional, a policy must be uniform and nondiscriminatory. Moreover, the policy cannot be used as a pretext for harassing innocent citizens. Here, the policy was to stop every third taxicab to make inquiry as to the safety of the driver, a nonarbitrary procedure with a reasonable basis.

Thus, inasmuch as the government may institute a policy to prevent the robbery of taxicab drivers, the issue becomes whether in these cases the implemented policy violated the rights

of the individuals. The challenges to the stops in these cases are made, not by the driver of the taxicabs, but by the passengers in those cabs. It is clear, however, that the interests of the driver and of the passengers are different. In both cases, the police stopped the drivers in order to insure that they were safe. Insofar as the taxicab drivers were concerned, the stops were akin to the request for information in People v DeBour (40 NY2d 210), which this Court found permissible. Nevertheless, even assuming that the vehicles were seized, there is nothing improper about the policy itself of the procedures used to effectuate that policy.

The case of People v John BB, 56 NY2d 482, supra supports the action taken here. There, a series of burglaries had occurred in a sparsely populated area of Sullivan County known as the Anawanda-Tennanah Lake region. Although there was no fixed checkpoint, the police decided to stop every vehicle in a general area. Pursuant to that policy, the car in which John BB. was a passenger was stopped although no evidence existed that the driver or passengers were engaged in any type of illegal activity. The driver was asked for his license and registration. When the driver got out of the car with the requested documents, the police shone a flashlight into the interior, revealing a rifle and a pellet gun that had been reported stolen. A subsequent search of the vehicle revealed additional items taken during the burglaries.

This Court held that the stop in that case was made pursuant to a "nonarbitrary, nondiscriminatory and uniform procedure" with no intent to harass (id., at 488). In determining the constitutionality of a stop, this Court stated:

> "The indefiniteness of the term 'unreasonable' militates against the construction of a general rule of universal application for determining the validity of official intrusions of this nature. Rather, the facts of each case must be examined and the essential inquiry is whether the police

> conduct may be characterized as reasonable, which in turn requires a balancing of the State's interest in the inquiry at issue against the individual's interest in being free from governmental interference" (id., at 487).

It is significant that in John BB., this Court determined that neither United States v Martinez-Fuerte (428 US 543) nor United States v Brignoni-Ponce (422 US 873) constituted a barrier to the procedure undertaken. In United States v Martinez-Fuerte, the Supreme Court upheld a fixed checkpoint location to check for illegal aliens even without a requirement of reasonable suspicion. In United States v Brignoni-Ponce, the Supreme Court held that, in a search for illegal aliens, a roving patrol which stopped a vehicle solely because the occupants appeared to be Mexican was unconstitutional and the reasonable suspicion was the standard for stopping such a vehicle.

Turning to the issue of standing, while defendants may have standing to challenge the stop of the taxicabs and to seek suppression of the contraband as fruit of an unlawful stop (see, People v Millan, 69 NY2d 514, 516), the evidence may be suppressed only if it is pursuant to an illegal stop directly leading to the discovery of the contraband (see, People v Rogers, 52 NY2d 527, 535). Here, arguably, the discovery of the drugs in both cases was due to the suspicious conduct of the passengers, not the stops of the taxicabs. Stated differently, in both cases before us, the search of the vehicle resulted from observed efforts to hide something under the front seat of the vehicle after the taxi was stopped.

In order to challenge the constitutionality of a search, the burden is on the person challenging the search to demonstrate a reasonable expectation of privacy (People v Wesley, 73 NY2d 351, 358-359). In both cases here there is no showing by defendants that they had a legitimate expectation of privacy in

the passenger compartment of the taxicabs (see, Rakus v Illinois, 439 US 128 [passengers did not have standing to contest the search of the automobile since they did not have an expectation of privacy]; People v Millan, 69 NY2d, supra, at 520 [reserving the issue of whether the passenger in a taxicab had an expectation of privacy in the passenger compartment. The taxicab had been stopped after it went through a red light]; People v Wesley, 73 NY2d 351 supra [defendants charged with constructive possession of a weapon do not have standing based on that factor alone]). For example, in Boswell, defendant denied possession of the bag in which the contraband was discovered, evincing that he had no reasonable expectation of privacy in that bag and, thus, no standing to challenge its admission into evidence (see, id., at 360-364). Thus, despite the majority's reluctance to deal with the issue of standing, it is central to both cases.

For these reasons, I dissent and vote to uphold the searches in both cases.

* * * * * * * * * * * * * * * * * *

Case No. 160: Order affirmed, without costs, and certified question not answered as unnecessary. Opinion by Judge Levine. Chief Judge Kaye and Judges Bellacosa, Wesley and Rosenblatt concur. Judge Smith dissents and votes to reverse in an opinion. Judge Ciparick took no part.

Case No. 161: Order reversed and order of Supreme Court, Bronx County, reinstated. Opinion by Judge Levine. Chief Judge Kaye and Judges Bellacosa, Wesley and Rosenblatt concur. Judge Smith dissents and votes to affirm in an opinion. Judge Ciparick took no part.

Decided November 30, 1999

Appendix B

Decision and Order of the Appellate Division, First Department, entered November 17, 1998. Official Cite 255 AD2d 173 (1st Dept. 1998)

Williams, J.P., Tom, Mazzarelli, Andrias, JJ.

1569 The People of the State of New York,
Appellant,

Stanley R. Kaplan

-against-

Keith Boswell,
Defendant-Respondent.

Order, Supreme Court, Bronx County (Robert Cohen, J.), entered on or about March 13, 1997, which, to the extent appealed from as limited by appellant's brief, upon reargument, adhered to its initial order, dated October 25, 1996, granting defendant's motion to suppress physical evidence, reversed, on the law, the motion to suppress denied and the matter remanded for further proceedings.

Defendant was indicated for two counts of criminal possession of a controlled substance in the third degree after the police stopped the taxi in which he was a passenger, and recovered drugs from a bag that they observed him kicking under the passenger seat. Defendant moved pre-trial to suppress the physical evidence recovered from the vehicle. Police Officer Ray Winslow testified at the suppression hearing that he was assigned to the Taxi Livery Task Force, where his duties included setting up taxi checkpoints, stopping cabs, and handing out literature containing safety tips to drivers. Winslow stated that the normal procedure required the presence of a supervisor at the checkpoint, and the stopping of every third taxi. It was the supervisor's responsibility to set the exact procedure and location of the checkpoint. To Winslow's knowledge, there were no written guidelines.

On February 26, 1996, at approximately 9:00 pm, Winslow and his partner, Sergeant Thomas Galati, parked their unmarked patrol car at 139 Exterior Avenue. When the third taxi passed, they pulled their car out, placing on the turret light. They caught

up to the taxi approximately a half a block later, and pulled it over. As the officers approached the taxi, they observed defendant kicking a bag under the seat. In response to the officer's questions as to whether the bag was his, defendant first responded "what bag," and then denied ownership of it. The police searched the bag and recovered drugs, money and two walkie talkies.

In a decision dated October 26, 1996, the suppression court granted defendant's motion to suppress, concluding that the stop of the cab was unlawful since the People failed to produce any evidence of a written, systematic procedure limiting the officers' discretion in conducting the checkpoint stop. The People moved for reargument based on this Court's intervening decision in People v. Serrano (233 AD2d 170, lv denied 89 NY2d 929). In Serrano (supra), we upheld a checkpoint stop as "nondiscriminatory and nondiscretionary," and specifically stated the procedure utilized was not invalid merely because is was not in writing. The suppression court granted reargument but adhered to its initial determination. The court distinguished the checkpoint stop in Serrano, since there, six to eight officers were involved, the checkpoint was visible to motorists and there was no pursuit of any vehicle. The court concluded that the stop in this case was more akin to a random patrol stop, and as such, required reasonable suspicion by the police that the driver was committing a traffic violation or that an occupant was engaging in criminal activity.

While it is beyond question that a roadblock stop constitutes a seizure within the meaning of the Fourth Amendment (People v Scott, 63 NY2d 518, 524: People v John BB, 56 NY2d 482, cert denied 459 US 1010; Delaware v Prouse, 440 US 648), it is likewise accepted that there is a diminished expectation of privacy in an automobile (People v Scott, supra at 525; United States v Martinez-Fuerte, 428 US 543, 556). Thus, "individualized suspicion is not a prerequisite to a constitutional

seizure of an automobile which is 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' " (People v Scott, supra at 525, quoting Brown v Texas, 443 US 47, 51).

The reasonableness of such a seizure must be judged "by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitimate governmental interests" (People v Scott, supra at 525; see also, People v Spencer, 84 NY2d 749, 754, cert denied 516 US 905). The key factors in this analysis "are the governmental interest involved and the effect of the procedure in relation to it" on the one hand, and "the degree of intrusion of the procedure on the individual subjected to it, measured in terms of both its subjective effect and the degree of discretion vested in the officials charged with carrying it out" on the other (People v Scott, supra at 525; see also, People v Spencer, supra at 754).

Balancing these factors, we conclude that the procedure utilized by the police in the instant case does not exceed constitutional limits, and is consistent with governing precedent. The testifying officer stated that he was a member of the Taxi Livery Task Force, whose unit had a specific program of stopping taxis at checkpoints in order to hand out safety literature. The governmental purpose of protecting taxi drivers and their passengers from criminal activity is patent. Moreover, the procedure, overseen by a supervisor, called for the "nondiscriminatory and nondiscretionary" stopping of every third taxi observed (see, People v Serrano, supra at 171). Officer Winslow testified that, consistent with this procedure, the vehicle in which defendant was riding was the third taxi observed, and therefore was stopped. As the officer's testimony regarding the checkpoint program and the circumstances surrounding the stop in this case stands uncontradicted in the record, the suggestion that the officers acted with unbridled discretion in stopping the subject vehicle is rejected (People v Serrano, supra at 171).

Moreover, the absence of written guidelines from the higher echelons of the Police Department does not automatically render a checkpoint program invalid where the procedure adopted is uniform and nondiscriminatory (id. at 171).

Additionally, the fact that this checkpoint involved minimal pursuit does not render it constitutionally impermissible. In People v John B.B. (supra), the Court of Appeals upheld the employment by police of a roving roadblock in a rural area where many burglaries had recently occurred. The procedure in John B.B. called for the stopping of every vehicle in the area in order to ascertain the identity of the occupants, and to obtain information about the burglaries. The Court found the suspicionless stops permissible since they were accomplished pursuant to a "nonarbitrary, nondiscriminatory and uniform procedure" (id. at 488). Although the present procedure involved the stopping of every third car, instead of every one, that fact does not affect its validity so long as a "specific nondiscriminatory pattern of selection is called for" (People v Scott, supra at 526). While Scott involved a fixed checkpoint, we believe this rule would similarly apply to the minimal pursuit procedure involved herein (but see, United States v Santiago, 950 F Supp 590 [SDNY 1996]).

We acknowledge the decisions of the United States Supreme Court disapproving of roving patrol stops (see, Delaware v Prouse, supra; United States v Brignoni-Ponce, 422 US 873; see also, United States v Martinez-Fuerte, supra), but find them distinguishable. In Delaware v Prouse (supra), the defendant's vehicle was stopped by a Delaware patrolman who testified that he stopped the car solely to check the driver's license and registration. The patrolman was not acting pursuant to any department guidelines or standards, but rather characterized the stop as "routine" (id. at 650). In United States v Brignoni-Ponce (supra), the procedure at issue was the asserted authority of Border Patrol agents to stop at random any vehicle near an

international border to determine if it contained illegal aliens or was involved in smuggling operations.

As should be plain, these roving-patrol procedures are characterized by the unlimited discretion afforded the government officials involved. Far from being systematic, they apparently were developed by the officers in the field on an ad hoc basis. They had no objective mechanism to limit the officers' discretion, nor did they profess to. In contrast, the procedure at issue incorporated many of the features of the traditional fixed checkpoint - the required presence of a supervisor, the fixed location of the police vehicle and a systematic selection process for stopping cars. In view of these similarities, that the police vehicle may not have been completely visible, and that the police car pursued the taxi for a short distance, does not tip the balance toward unreasonableness (see, People v John B.B., supra; cf., Delaware v Prouse, supra; United States v Brignoni-Ponce, supra).

We further find Matter of Muhammad F. (__AD2d__, Appeal No. 725 [decided simultaneously herewith]) distinguishable from the instant case. In Muhammad F. (supra), this Court found that a police roving-patrol program whereby one out of every three occupied taxi or livery cabs would be stopped for "safety checks" was constitutionally infirm. We stated that the procedure gave the police far too much discretion in choosing which vehicle to stop. Here, unlike Muhammad F., the checkpoint was at a fixed location, and a supervisor was always required to be present.

As defendant abandoned the bag when he disclaimed ownership, and the abandonment was not precipitated by any illegal conduct of the police (see, People v Morales, 243 AD2d 391, lv denied 91 NY2d 877; People v Boyd, 213 AD2d 291, lv denied 85 NY2d 970), the motion to suppress should not have been granted.

Accordingly, we reverse and remand for further proceedings.

All concur except Tom, J. who dissents in a memorandum as follows:

TOM, J. (dissenting)

The issue raised on this appeal is whether a suspicionless stop of an occupied cab by officers in an unmarked police vehicle under the circumstances of this case was constitutionally permissible and valid.

Police Officer Ray Winslow, a member of the Street Crime Unit of the New York City Police Department, testified that he was working the 5:30 PM to 2:05 AM tour on February 27, 1995, and was assigned to the Taxi Livery Task Force in the 44th/46th Precinct. He explained that the Task Force is sent out to precincts with a high number of cab robberies, where its duties are to set up taxi check points, stop cabs, and hand out safety tips and other literature to cab drivers. A supervisor is supposed to be present at checkpoints and "usually" every third cab is stopped. The number, which "is different sometimes," was possibly selected by the supervisor, but Winslow was "not exactly sure," and he was unaware if there were criteria for the ratio selected.

On that date, Winslow was teamed with Sergeant Thomas Galati, who was the supervisor. Galati was not called by the People, so that the record does not contain further information about departmental policy, if any, concerning the selection criteria for cab stops. Both officers were in plainclothes; both sat in an unmarked police car secreted in the vicinity of 725 Exterior Avenue in the Bronx. At approximately 9:00 PM, they pulled over the first cab of the evening, which was the third cab in sequence observed by the officers. This cab contained defendant as a passenger, leading to his arrest, as is related in the majority's

decision. On cross-examination, Winslow testified that he had not been given a specific location to locate the unmarked car, a choice that was basically up to the Sergeant and himself. The direction to stop every third cab was only verbally relayed; there was no written policy. Winslow conceded defense counsel's observation that this was not a classic checkpoint, in that there was no marked police vehicle in a stationary position, at which location officers direct cars to pull over for a registration or DWI check. Here, the unmarked police car was parked on the side of the road at night, presumably out of sight of moving vehicles, awaiting passing cabs. Although Winslow indicated that they were stationary, they nevertheless operated by letting the targeted cab pass them first, after which the officers would follow, with turret light lit, and pull the cab over.

The stop in this case was pursuant to the New York City Police Department's Taxi Livery Task Force program that has been criticized on Fourth Amendment grounds by other courts (see, e.g., United States v Santiago, 950 F Supp 590). In Matter of Muhammad F. (__AD2d__, App. No. 725 decided simultaneously herewith), we analyzed this program in the context of Federal and State constitutional law allowing stops, unsupported by reasonable suspicion, of cabs and other vehicles at fixed locations and "roving roadblocks". The facts in Muhammad F. bore a striking similarity to those in Santiago, to the extent that apparently the same officer was involved, and the stop and arrest in Muhammad F. occurred three days after that in Santiago. Since the policy of mobile patrols stopping cabs in Muhammad F. did not derive from formal guidelines, but appeared to have been formulated at the street level, documentation of stops and results was not furnished, and the officers, rather than being identified, were in an unmarked car, we found insufficient indicia of a nonarbitrary and uniform policy to satisfy constitutional standards. Although the majority relies on the supposedly fixed situs of the police car in this case to authorize the stop as a checkpoint stop, under these facts, I see

that as a distinction without a real difference. Notwithstanding my sympathy with the Department's goals, I do not see how this stop can pass constitutional muster as previously articulated by this Court and the Court of Appeals.

Case law has developed an analytical model for judging the propriety of police stops of moving cars unsupported by reasonable suspicion and the policies or programs on which the stops are predicated. It is clear that a roadblock or checkpoint stop is as much of a seizure within the meaning of the Fourth Amendment as is a non-checkpoint stop of a moving car (United States v Hensley, 469 US 221, 226; Delaware v Prouse, 440 US 648; People v John BB, 56 NY2d 482, cert denied 459 US 1010). Although individualized suspicion is not a prerequisite to a constitutional seizure of a vehicle that is carried out according to a policy or program incorporating explicit, neutral limitations on the conduct of the individual officers undertaking the seizure (Delaware v Prouse, supra at 663), nevertheless, the seizure must be justified in constitutional terms. This requires that a court evaluating the legality of the stop and seizure balance the consequential intrusion into the individual's Fourth Amendment interests against the promotion of legitimate governmental interests (John BB, supra at 487; People v Scott, 63 NY2d 518, 525; Delaware v Prouse, supra at 657). The intrusion is characterized as both objective and subjective. The subjective intrusion would be measured in terms of the anxiety or inconvenience experienced by the individual being stopped; the objective intrusion is the stop itself (United States v Santiago, 950 F Supp 590, 595). The analysis balancing these interests requires a preliminary evaluation of the nature and extent of the governmental interest involved, the effect of the program or policy in relation to it, and the degree of the intrusion on the individual, as measured by the subjective effect on that individual and the degree of discretion accorded the officers under the policy (People v Scott, supra at 525).

There are two aspects of this police program that require analysis: the extent of, and justification for, the intrusion; and the degree of discretion vested in the officers responsible for carrying out the program.

The purported goal of the program was to hand out safety pamphlets to cab drivers. It is uncontroverted that the officers were not investigating a recent or ongoing crime or preventing the imminent commission of a robbery, despite some testimonial suggestion that the officers' efforts were motivated by recent cab robberies in the vicinity. As such, the government interest in generally discouraging or investigating criminal activity, "does not implicate the same important social objectives that are at issue when police are investigating recent or ongoing suspected criminal activity" (People v Spencer, 84 NY2d 749, 754 cert denied 516 US 905). In "the absence of a crime 'afoot' " (id., 756, citing United States v Ward, 488 F 2d 162), the People bear the burden of demonstrating the "genuine need for so immediate and intrusive an action as pulling over [a] freely moving vehicle" (Spencer, supra at 757), especially when less intrusive alternatives are available (id., 758). Parenthetically, to the extent that the police motive was informational, the same information might have been conveyed by other means, possibly by distributing safety pamphlets to dispatchers or the like for further distribution to cab drivers, but the record is silent on whether such methods were tried or even posited.

Turning to the nature of the stop, the "objective intrusion, . . . checkpoint stops [are viewed] in a different light [from roving patrols] because the subjective intrusion - the generating of concern or even fright on the part of lawful travelers - is appreciably less in the case of a checkpoint stop" (Santiago, supra at 595). The sine qua non of a valid checkpoint, typically for license and registration or sobriety checks, at which vehicles are stopped without regard to particularized suspicion, is in the very obviousness of the police presence and purposes and its

stationary nature. For instance, in People v Scott (supra) the Court of Appeals found valid a roadblock, flagged by warning signs facing traffic in both directions some 300 feet from the checkpoint, manned by two marked police vehicles with flashing turret lights, and highlighted by flares placed in the center of the road, at which all vehicles were stopped. The Court of Appeals found that precautions as to safety, lighting and fair warning could alleviate drivers' subjective reactions caused by sudden and apparently purposeless intrusions by patrolling police. The fact that the checkpoint was moved on a regular basis to other, pre-selected, locations did not diminish the stationary nature of the roadblocks (id.). We found a roadblock to be valid where several officers, responding to a spate of neighborhood car thefts, were assigned to conduct systematic mandatory car stops on a specified corner and directed to pull over every vehicle coming down the block to check ownership papers (People v Serrano, 233 AD2d 170 lv denied 89 NY2d 929). Although generally invalidating "roving patrols" which stop vehicles without reasonable suspicion, the Court of Appeals has allowed a "roving roadblock" under narrow circumstances not present here - when police uniformly stopped all vehicles in a sparsely populated rural area in connection with recent robberies (People v John BB., 56 NY2d 482).

In the present case, the People characterize the "checkpoint" as being stationary. While the record does not indicate that this was exactly the type of roving patrol that we invalidated in Muhammad F., and for which suppression was required in United States v Santiago, (supra), it was nevertheless more akin to a mobile patrol than to a stationary checkpoint. It bears repeating that the police vehicle was unmarked and secreted in the night and, rather than stopping vehicles at the actual checkpoint, the officers, in plainclothes, were positioned so as to require a pursuit, even if a quick one, as the cab blithely passed beyond the supposedly stationary checkpoint.

Nor does the nature of the "policy" in this case instill confidence in its uniformity, in the indiscriminate nature of the selection criteria, and in its restriction of subjective motivations by the very officers carrying out the "policy." In short, there was no policy, in the sense that identified criteria were not promulgated by the central command. Rather, at best, this record suggests that the very officers carrying out the policy were the ones who were formulating it. Although deciding on different grounds, we have noted elsewhere that the fact that the Police Department allows officers to exercise discretion to stop cabs ostensibly for the safety of the drivers in the absence of reasonable suspicion of actual criminal activity does not mean that the stop thereby is justified (People v Concepcion, 216 AD2d 141 lv denied 86 NY2d 792). The present record suggests just such street-level discretion, or, at best, as characterized by the Second Department, only "an unelaborated precinct directive" (People v Vails, 170 AD2d 550) as the predicate for the stop. By contrast, in People v Scott (supra), the County Sheriff's office had established a written policy, incorporating objective criteria (every car was stopped) and selecting the actual checkpoints as well as the time periods of operation and of rotation among the checkpoint sites. The officers in Scott conducting the stops had virtually no discretion as to whom to stop. This is not to suggest that all discretion ought to be removed from the officer at the scene, or that a policy, to be valid, must be in writing (a requirement that we declined to adopt in Serrano) but those circumstances have been identified by the Court of Appeals as factors enhancing the nonarbitrariness required by constitutional standards. It bears repeating that the supervisory officer who was on the scene might have clarified the parameters and formality of the policy, but he was not called as a witness by the People.

The People contend that the selection of an objective number (stopping one in three cabs) somehow makes the selection sufficiently neutral to insulate each stop from the officer's

unfettered discretion. The Southern District, examining the very argument advanced in the present case, characterized this logic as "plainly wrong" (Santiago, supra at 596). In that case, as in this case, there were no written rules, either the individual officers or unidentified persons in the precinct decided where and when to conduct stops, there was no reporting regarding the stops, there was no oversight as to whether stops were truly conducted in a neutral manner, and the patrols seemed to have been conducted disproportionately at night. All of this undermined the ostensible informational motive of the program. As previously noted, the informational ends in Santiago, as here, likely could have been accomplished with equal or even greater ease and efficiency by distributing pamphlets and making police presentations at central locations, such as taxi dispatch locations, taxi inspection stations, or through the Taxi and Limousine Commission. This is not to suggest that any of these various points should be necessary requirements in promulgating this type of program, but in the aggregate, the silence of the present record undermines the very clarity and neutrality that case law has required for vehicle stops unsupported by reasonable suspicion.

As I noted at the outset, since I cannot see how these facts can be rationally distinguished from those in Muhammad F., in which this Court requires suppression, or how a reversal in this case is in line with Court of Appeals authority, I conclude that the motion court properly construed governing case law and properly suppressed. For that reason, I respectfully dissent.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: November 17, 1998

S/Catherine O'Hagan Wolfe
Clerk

Appendix C

Decision and Order of the Hearing Court on Reargument, entered March 13, 1997

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 39

----------x

PEOPLE OF THE STATE OF NEW YORK,

-against- Indictment No: 1946/95

DECISION AND ORDER

KEITH BOSWELL,

Defendant.

----------x

ROBERT L. COHEN, J.:

The People have moved to reargue the Court's decision which granted the defendant's motion to suppress a warrantless police seizure of physical evidence from the rear passenger compartment of a taxi cab in which the defendant was the sole passenger.

This Court held that the forcible cab stop for the sole purpose of handing out safety literature and safety tips to the cab driver, was unconstitutional, because there was no "explicit, neutral limitations on the conduct of the individual officers" (People v. Scott, 63 NY2d 518, 525). Additionally, the Court noted that the People's only witness was unaware of any established criteria or written guidelines limiting individual police discretion in conducting checkpoint stops (see, People v. Scott, supra; cf. People v. Spencer, 84 NY2d 749, 758; People v. Concepcion, 216 AD2d 141, lv. denied 86 NY2d 792).

The People's motion to reargue is based upon a subsequently decided case by the Appellate Division, First Department, in People v. Serrano, __AD2d__, 650 NYS2d 95, holding that a

plan establishing a roadblock does not have to be "in writing emanating from the higher echelons of the Police Department, as was the case in People v. Scott [63 NY2d 518] . . ., the only requirement being that the procedure followed be uniform and not gratuitous or subject to individually discriminatory selection (citing People v. Ingle, 36 NY2d 413, 416)." Serrano, __AD2d __, 650 NYS2d at 96-97, supra.

The People's motion to reargue is granted, and upon reargument, the Court makes the following findings of fact and conclusion of law.

I. The Hearing

Police Officer Ray Winslow was the only witness to testify at the Mapp hearing. On February 27, 1995, Winslow's tour of duty began at 5:30 P.M.. He and his supervisor, Sergeant Thomas Galati, were assigned to the Taxi Livery Task Force, and were on routine anti-crime patrol, in an unmarked police vehicle, in plainclothes, until about 9:00 p.m., when Segeant Galati orally directed Officer Winslow to set up a "checkpoint" in the vicinity of 139th Street and Exterior Avenue, in the Bronx.

Galati informed Winslow that they would be stopping every third taxi cab for the purpose of handing out safety literature and safety tips to the cab drivers. While they were parked at the side of the road, the defendant's cab passed the unmarked vehicle, and since, according to Officer Wnslow, it was the third cab, the unmarked police car activated its lights and pursued the cab for about a half a block, pulling it over opposite 725 Exterior Avenue.

After parking behind the cab, Sergeant Galati approached the driver's side while Officer Winslow approached the passenger side of the cab. Winslow observed the defendant, who was in the rear passenger compartment, "dip down" and "come back up

real quick". Winslow then observed the defendant kick a "dark blue like Gap bag" under the front seat, and asked him why he was doing that. The defendant replied, "What bag," and also said "that's not my bag".

Sergeant Galati entered the rear passenger compartment, removed the "Gap" bag, informed Winslow that there were a lot of drugs inside, and the defendant was arrested.

Officer Winslow testified that he was not aware of any guidelines regarding the cab stops, written or otherwise, nor was he familiar with the criteria that Sergeant Galati used in determining what cabs to stop, and that the procedures for stopping cabs "is different sometimes. That night it was every third cab".

At bar, it is disputed that there was no traffic infraction committed or suspected, nor did the police observe any criminal activity relating to the cab driver or defendant. Notably, there is no evidence that the cab driver was given any safety literature or safety tips by either officer, and, there is no evidence that either officer approached the cab driver with safety literature in their possession.

II. Findings of Fact and Conclusions of Law

The People contend that Sergeant Galati's oral instruction to Officer Winslow to set up a checkpoint and stop every third taxi cab for the purpose of handing out safety literature and safety tips to cab drivers was nondiscriminatory, and was thus lawful, citing People v. Serrano, ___AD2d___, 650 NYS2d 95, 96-97, supra.

In my opinion, the People's characterization of the police action as a "checkpoint" operation, is in error, and their reliance upon People v. Serrano, supra, is also inapposite to the facts of

this case. Serrano involved a "roadblock" conducted by six to eight officers under the supervision of a sergeant conducting mandatory stops to check for stolen cars in an area proximate to where "a lot of stolen vehicles" were recovered. People v. Serrano, 650 NYS2d , at 96.

At bar, Winslow and his sergeant were alone, in an unmarked vehicle, in plainclothes, parked at night at the side of the road, presumably out of sight, and when defendant's cab passed them, the unmarked police vehicle pursued the cab effecting a forcible stop of the cab.

I find that the foregoing police action was not a checkpoint stop, as that term is understood in search and seizure jurisprudence, but, rather, Officer Winslow's pursuit, and forcible stop of the cab, constituted in actuality a random patrol type stop requiring as a factual predicate reasonable suspicion that a vehicle and traffic law violation or reasonable suspicion that an occupant of the vehicle has committed, was committing, or was about to commit a crime (see, Delaware v. Prouse, 440 U.S. 648; United States v. Brignoni-Ponce, 422 U.S. 873; Almeida-Sanchez v. United States, 413 U.S. 266; United States v. Santiago, 1996 WL 742856 (S.D.N.Y.); People v. Spencer, 84 NY2d 749; People v. May, 81 NY2d 725; People v. Millan, 69 NY2d 514; People v. Sobotker, 43 NY2d 559; People v. Ingle, 36 NY2d 413; People v. Concepcion, 216 AD2d 141, lv. denied 86 NY2d 792; People v. Rosario, 160 Misc.2d 1081; People v. Genn, 144 Misc.2d 596).

Importantly, a checkpoint stop has certain characteristics that are consonant with the Fourth Amendment's guarantee that a search and seizure not be "unreasonable". Those characteristics were aptly described in United States v. Ortiz, 442 U.S. 891, 893, quoting from United States v. Baca, 368 F. Supp. 398, 410-411, as follows:

> Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'ALL VEHICLES, STOP AHEAD, 1 MILE.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'WATCH FOR BRAKE LIGHTS.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'STOP HERE - U.S. OFFICERS'. Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'STOP' sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities: There are also floodlights for nighttime operation

See also, United States v. Martinez-Fuerte, 428 U.S. at 545-546, supra; Michigan v. Sitz, 496 U.S. 444; Maxwell v. City of New York, 102 F.3rd 664; People v. Scott, 63 NY2d, at 525-526, supra.

Additionally, the Supreme Court in Ortiz noted that checkpoint stops are far less intrusive than the circumstances surrounding a roving-patrol stop:

> Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he

> can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

United States v. Ortiz, 422 U.S., at 894-895, supra. In the United States v. Martinez-Fuerte, 428 U.S. 543, 559, supra, the Court once again identified those factors that distinguish a checkpoint seizure from a roving patrol, stating:

> [C]heckpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. (emphasis added).

Importantly, the Court further observed :

> The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops,

United States v. Martinez-Fuerte, 428 U.S., at 559 (emphasis added).

In People v. Scott, 63 NY2d 518, 525, supra, the Court of Appeals stated that a checkpoint seizure of an automobile must be "'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' [citing Brown v. Texas, 443 U.S. 47, 51; Delaware v. Prouse, 440 U.S. 648, 663; United States v. Martinez-Fuerte, 428 U.S. 543, 558-562]".

Most significantly, the Court in Scott held that the checkpoint program at issue there

> [W]as being maintained in accordance with a uniform procedure which afforded little discretion to operating personnel, and that adequate precautions as to safety, lighting and fair warning of the existence of the checkpoint were in operation

People v. Scott, 63 NY2d, at 526, supra, (citations omitted) (emphasis added).

In contrast to the above-noted illustrations of the essential components of a valid checkpoint stop (see also, Michigan v. Sitz, 496 U.S. 444, supra; Maxwell v. City of New York, 102 F.3rd 664, supra, (2nd Cir. 1996)), the police action at bar bore none of those important characteristics. The stop here was at night, without warning, by an unmarked police car that pursued the taxi cab in which the defendant was a passenger and forcibly stopped the cab's lawful progress to its destination.

The police action here was, in fact, a roving-patrol type stop devoid of any factual predicate, with less justification than the stops condemned in United States v. Brignoni-Ponce, 422 U.S. 873, supra; Almeida-Sanchez v. United States, 413 U.S. 266, supra; People v. Spencer, 84 NY2d 749, 758, supra; People v. May, 81 NY2d 725, supra; People v. Sobotker,43 NY2d 559,

supra; People v. Concepcion, 216 AD2d 141, lv denied 86 NY2d 742, supra.

The avowed purpose for the stop, to hand out safety literature to cab drivers, could be effectively accomplished in other ways, suggested in United States v. Santiago, 1996 WL 742856, supra, (S.D.N.Y.), by distributing such information through the Tax and Limousine Commission, at dispatch offices, and taxi inspection stations.

As poignantly observed in People v. DeBour, 40 NY2d 210, 220, "[o]ne aspect of law enforcement warrants particular mention and that is the area of crime prevention. Since this function is highly susceptible to subconstitutional abuses it will be subject to the greatest scrutiny . . ." (emphasis added).

In sum, I find the forcible stop of the cab an unreasonable seizure in violation of the defendant's reasonable expectation of privacy and freedom from arbitrary governmental interference "at the unfettered discretion of officers in the field". Brown v. Texas, 443 U.S.47, 50-51, supra; Delaware v. Prouse, 440 U.S. 648, 654-655, supra; United States v. Brignoni-Ponce, 422 U.S. 873, 882, supra; United States v. Santiago, 1996 WL 742856, supra; People v. Scott, 63 NY2d 518, supra; People v. Rosario, 160 Misc.2d 1081, supra; People v. Genn, 144 Misc.2d 596, supra.

Accordingly, upon reargument, this Court adheres to its prior decision and order, dated October 26, 1996, granting defendant's motion in all respects.[1]

---

[1] Had this stop been lawful defendant's denial of ownership or knowledge of the "Gap" bag, constituted an abandonment and consequently, defendant would lack standing to challenge the search of the bag (see, People v. Harris, ___AD2d___, 643 NYS2d 88; People v. Boyd, 213 AD2d 291, 292, appeal denied 85 NY2d 970; People v. Hazel, 194 AD2d 440, lv denied 82

This opinion constitutes the decision and order of the Court.

Dated: March 13, 1997

S/RLC
Robert L. Cohen
J.S.C.

Received
District Attorney
Bronx County

97 Mar 27 PM 1:48

Filed
March 26 Rec'd
Supreme Court Clerk's Office
Bronx County

NY2d 755). However, since the stop was unconstitutional, the evidence subsequently seized must be suppressed as the "fruit" of that unlawful seizure (see, Wong Sun v. United States, 371 U.S. 471, 485; People v. Holmes, 81 NY2d 1056; People v. Millan, 69 NY2d 514; People v. Rijo, 220 AD2d 217, appeal denied 88 NY2d 852; People v. Concepcion, Supra.

Appendix D

Initial Decision and Order of the Hearing Court entered October 25, 1996

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 39

----------x

PEOPLE OF THE STATE OF NEW YORK,

-against

Indictment No: 1946/95
DECISION AND ORDER

KEITH BOSWELL,

Defendant,

----------x

ROBERT L. COHEN, J.:

Defendant is charged with two counts of Criminal Possession of a Controlled Substance in the Third Degree, i.e., possession of cocaine with intent to sell and possession of one or more preparations . . . of an aggregate weight of one-half ounce or more containing a narcotic drug, cocaine.

A Mapp hearing was held on defendant's motion to suppress the warrantless seizure of a bag containing the alleged cocaine recovered by the police following a taxi cab stop.

I. The Hearing

Police officer Ray Winslow was the only witness at the hearing. He testified that on February 27, 1995, he was assigned to the Taxi Livery task force covering the 44th and 46th precincts working a 5:30 p.m. to 2:05 a.m. tour of duty. His supervisor was Sergeant Thomas Galati who orally instructed him to set up a checkpoint in the vicinity of 725 Exterior Avenue, in the Bronx. Their purpose was to hand out safety literature and safety tips to cab drivers.

Sergeant Galati was the driver of their unmarked vehicle and Officer Winslow was in the front passenger seat. Both officers were in plainclothes. Sgt. Galati gave an oral direction to stop every third cab, and, at about 9 P.M., the officers' pulled over a cab opposite 725 Exterior Street.

Sergeant Galati approached the cab on the driver's side while Officer Winslow approached the passenger side. Winslow observed the defendant seated in the right rear passenger compartment of the cab and noticed the defendant "dip down" and "come back up real quick". Winslow saw the defendant kicking a "dark blue like Gap bag" under the front seat, and asked him why he was doing that. The defendant replied "what bag", and also said "that's not my bag".

The defendant was directed to exit the cab, and then Sgt. Galati entered the rear passenger compartment and retrieved the same bag Winslow saw the defendant kick under the front seat. Galati said there were a lot of drugs inside the bag, and the defendant was then arrested. Officer Winslow observed crack vials, money, and walkie talkies in the bag.

Regarding the cab stop, Officer Winslow did not know the criteria Sgt. Galati used in determining what cabs to stop, nor was Winslow aware of any written guidelines in that regard. Winslow also testified that the procedures for stopping cabs "is different sometimes. That night it was every third cab."

Before the stop in question, Officer Winslow did not observe any traffic infraction nor did he observe any criminal activity relating to the cab in which defendant was a passenger. After the stop, Winslow did not speak to the driver, and did not know if Sgt. Galati spoke to the driver. Notably, there is no evidence that the cab driver was given any safety literature or safety tips.

II. Findings of Fact and Conclusions of Law

A police/pedestrian encounter does not always constitute a "seizure" (see generally, People v. DeBour, 40 NY2d 210; People v. Hollman, 79 NY2d 181; People v. Bora, 83 NY2d 531). However the police stop of a vehicle is a seizure implicating constitutional guarantees (see, People v. Spencer, 84 NY2d 749; People v. May, 81 NY2d 725; People v. Millan, 69 NY2d 514; People v. Harrison, 57 NY2d 470; People v. Sobotker, 43 NY2d 559; People v. Ingle, 36 NY2d 413).

At bar, the defendant has standing to challenge the stop of the cab in which he was a passenger and may seek to suppress "the product of that allegedly unlawful police conduct." People v. Millan, 669 NY2d, at 516, supra; People v. May, 81 NY2d, at 727, supra; People v. Concepcion, 216 AD2d 141, lv. denied 86 NY2d 792.

Ordinarily the police may not stop a vehicle in the absence of observing either a traffic infraction or possessing reasonable suspicion "that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime (citations omitted)." People v. Spencer, 84 NY2d, at 753, supra.

In the case of a roadblock or checkpoint stop, which is a seizure within the contemplation of the Fourth Amendment (see, People v. Scott, 63 NY2d 518, 524; People v. John BB., 56 NY2d 482, cert. denied 459 US 1010; People v. Concepcion, 216 AD2d 141, supra), "individualized suspicion is not a prerequisite to a constitutional seizure of an automobile which is 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' (citations omitted)" People v. Scott, 63 NY2d, at 525, supra.

At bar, there were no "explicit, neutral limitations on the conduct of the individual officers" (People v. Scott, 63 NY2d, at

525, supra). Sgt. Galati apparently created an ad hoc policy of what cab to stop, and Officer Winslow was unaware of any written guidelines or directives from his precinct commander, or anyone else, establishing criteria for law enforcement personnel limiting individual police discretion in conducting checkpoint stops[1] (see, People v. Concepcion, 216 AD2d 141, supra).

Finally, what was stated by the Court in Spencer, 84 NY2d 749, 758, is particularly applicable to the facts herein:

> [T]he instant seizure is also unreasonable when measured in terms of the degree of discretion vested in the officials charged with carrying it out (see, Scott, 63 NY2d, at 525, supra). The act of forcibly pulling defendant over resulted from the unchecked discretion of the particular officers involved. It must be kept in mind that the defendant was not the subject of individualized suspicion. In the absence thereof, other safeguards are necessary to ensure that his reasonable expectation of privacy is not subject solely to the discretion of the police. In this case, there were no objective safeguards circumscribing the exercise of

---

[1] An inventory search must be conducted according to a routine procedure pursuant to a written policy or directive from a police commander, even though the automobile is already in lawful police custody. The purpose of established guidelines is to limit the discretion of the officer in the field. People v. Galak, 80 NY2d 715.

> police discretion. The stop of defendant was standardless and unconstrained. Nor can we accept the People's urging that the police officers acted in good faith. Subjective good faith, standing alone, is not enough (emphasis added).

In sum, the People failed to produce any evidence of a written systematic procedure limiting Officer Winslow's discretion in the conduct of the checkpoint cab stop in the instant case. Notably, Sgt. Galati, the creator of the alleged ad hoc taxi stop policy, was not called as a witness (cf. People v. Brown, 34 NY2d 658, 659-660; People v. Miles, 48 AD2d 706).

Based on the foregoing, I find that the stop of the defendant's cab was unconstitutional (see, People v. Scott, 63 NY2d 518, supra; People v. BB., 56 NY2d 482, supra, People v. Concepcion, 216 AD2d 141, supra, and that the evidence thereafter discovered was in direct response to the unlawful stop (see, Wong Sun v. United States, 371 U.S. 471, 485; People v. Holmes, 81 NY2d 1056; People v. Millan, 69 NY2d 514, supra; People v. Rijo, 220 AD2d 217; People v. Concepcion, 216 AD2d 141, supra.

Accordingly, the defendant's motion to suppress is, in all respects, granted.

This opinion constitutes the decision and order of the Court.

Dated: October 25, 1996

s/ Robert L. Cohen

J.S.C.

Filed
November 6 Rec'd
Supreme Court Clerk's Office
Bronx County